Roy Hew Chee Kay v Passion Entertainment Sdn Bhd & Anor

HIGH COURT (SHAH ALAM) — WRIT NO BA-22NCVC-590–10 OF 2017
AKHTAR TAHIR J
20 AUGUST 2018

Contract — Agreement — Breach — Plaintiff invested in first defendant's movie project — Parties entered into investment agreement — Defendants failed to repay money invested by plaintiff — Whether there was breach of agreement by defendants — Whether plaintiff entitled to terminate agreement and recover his investment — Whether plaintiff entered into agreement voluntarily — Whether second defendant coerced into agreeing to refund plaintiff's investment

The plaintiff's claim in the present case was in respect of the sum RM2m being the plaintiff's investment in the first defendant's movie project vide an investment agreement dated 1 March 2012 ('the investment agreement'). The plaintiff's investment was intended to defray the costs of production and pay the expenses for two actors specifically mentioned in the investment agreement. In accordance with the investment agreement, the defendants had the duty to provide to the plaintiff a half yearly statement of income and expenditure which was not done. The plaintiff was claiming for the sum to be returned after the completion and showing of the movie to the public. The defendants maintained that the sum need only be returned if the film made a profit, to which they claim it did not. The defendants refused to return the investment sum and the second defendant avoided meeting the plaintiff. The plaintiff had sought the help of some friends to lure the second defendant for a meeting where the second defendant executed two guarantees for the repayment of the sum invested and also on the same day transferred the sum of RM30,000. The plaintiff in the present case claimed for the remaining sum due and payable to him, whilst the defendants challenged the validity of the two guarantees issued and the RM30,000 was alleged to have been made under coercion and duress. The court identified the issues to be determined were whether there was a breach of the investment agreement by the defendants, enabling the plaintiff to terminate the agreement and recover his investment; whether the plaintiff entered into the investment agreement voluntarily; and whether the second defendant was coerced into agreeing to refund the investment.

Held, allowing the plantiff's claim with costs of RM30,000 and dismissing the

defendants' counterclaim with costs of RM10,000:

(1) The investment agreement had to be looked in its totality, which clearly showed that the defendants had to update the plaintiff on the utilisation of the investment. The agreement recognised this need to update the plaintiff by including cl 2.4 (see paras 9–10).

(2) Clause 2.4 was a material requirement in the agreement and the defendants' failure to comply with this clause was a material breach of the agreement. The fact that the plaintiff did not ask for the reports did not absolve the second defendants to adhere to the contractual terms of the agreement (see para 12).

(3) The court believed the testimony of the plaintiff that he was induced unfairly by the second defendant to make the investment so as not to lose the commission owed by the second defendant to him. The court did not believe the testimony of the second defendant that the investment was thrust upon him against his wishes. It was clear by utilising the plaintiff's money the defendant had gladly accepted the plaintiff's investment (see para 14).

(4) The fact remained that during the meeting, the second defendant had promised to return the investment sum gradually. The court found that this promise made by the second defendant was not made under coercion but voluntarily as if it was otherwise the second defendant had the opportunity to voice his protest at the meeting or afterwards to the journalist who had interviewed him. The second defendant did not do so was an indication that deep inside the second defendant knew he had to refund the plaintiff's investment (see para 15).

[Bahasa Malaysia summary

Tuntutan plaintif dalam kes ini adalah berkenaan dengan pelaburan plaintif berjumlah RM2 juta dalam projek filem defendan pertama melalui satu perjanjian pelaburan bertarikh 1 Mac 2012 ('perjanjian pelaburan tersebut'). Pelaburan plaintif bertujuan untuk membiayai kos pengeluaran dan membayar perbelanjaan untuk dua pelakon yang dinamakan secara spesifik dalam perjanjian pelaburan tersebut. Selaras dengan perjanjian pelaburan tersebut, defendan-defendan mempunyai tanggungjawab untuk menyediakan kepada plaintif penyata pendapatan dan perbelanjaan separa tahunan yang mana tidak dilaksanakan. Plaintif menuntut untuk jumlah yang perlu dipulangkan selepas selesai dan filem tersebut ditunjukkan kepada khalayak ramai. Defendan-defendan menegaskan bahawa jumlah tersebut hanya perlu dipulangkan sekiranya filem tersebut mengaut keuntungan, yang mana mereka menyatakan bahawa filem itu tidak menguntungkan. Defendan-defendan enggan untuk memulangkan jumlah pelaburan tersebut dan defendan kedua

mengelak daripada berjumpa dengan plaintif. Plaintif kemudiannya mendapatkan bantuan beberapa orang kawan untuk mengumpan defendan kedua untuk satu perjumpaan yang mana defendan kedua telah menandatangani dua jaminan untuk pembayaran semula jumlah pelaburan dan juga pada hari yang sama memindahkan sejumlah RM30,000. Plaintif menuntut jumlah selebihnya yang perlu dibayar kepadanya, sementara defendan menyoal kesahihan dua jaminan yang dan jumlah RM30,000 yang dikatakan dibuat di bawah keadaan paksaan dan dures. Mahkamah telah mengenalpasti isu untuk diputuskan adalah sama ada wujud pelanggaran perjanjian pelaburan oleh defendan-defendan, membolehkan plaintif untuk menamatkan perjanjian dan mendapatkan semula pelaburannya; dan sama ada defendan kedua dipaksa untuk bersetuju untuk memulangkan semula pelaburan.

Diputuskan, membenarkan tuntutan plaintiff dengan kos sebanyak RM30,000 dan mengetepikan tuntutan balas defendan-defendan dengan kos sebanyak RM10,000:

(1) Perjanjian pelaburan tersebut hendaklah dilihat secara keseluruhan, yang dengan jelas menyatakan bahawa defendan-defendan perlu untuk memaklumkan kepada defendan berkenaan dengan penggunaan pelaburan tersebut. Perjanjian tersebut mengiktiraf keperluan ini dan keperluan untuk memaklumkan kepada plaintif dengan memasukkan klausa 2.4 (lihat perenggan 9–10).

(2) Klausa 2.4 adalah keperluan material dalam perjanjian tersebut dan kegagalan defendan-defendan untuk mematuhi klausa tersebut adalah pelanggaran material kontrak tersebut. Fakta bahawa plaintif tidak meminta laporan tersebut tidak membebaskan defendan kedua untuk mematuhi terma kontrak perjanjian tersebut (lihat perenggan 12).

(3) Mahkamah mempercayai keterangan plaintif yang dia dipengaruhi secara salah oleh defendan kedua untuk membuat pelaburan tersebut supaya tidak kehilangan komisyen yang defendan kedua berhutang kepada plaintif. Mahkamah tidak mempercayai keterangan defendan kedua yang pelaburan tersebut dipaksa ke atasnya tanpa keinginanya. Adalah jelas apabila wang plaintif digunakan, defendan telah dengan senang hati menerima pelaburan plaintif. (lihat perenggan 14)

(4) Fakta yang sewaktu mesyuarat tersebut, defendan kedua berjanji untuk memulangkan jumlah pelaburan secara ansuran. Mahkamah mendapati bahawa janji ini yang dibuat oleh defendan kedua tidak dibuat dibawah paksaan, tetapi secara sukarela, kerana jikalau sebaliknya defendan kedua diberi peluang untuk menyuarakan bantahan sewaktu perjumpaan tersebut atau selepas itu sewaktu ditemubual oleh wartawan. Defendan kedua yang tidak melakukan perkara tersebut merupakan satu tanda yang defendan kedua tahu bahawa dia perlu untuk memulangkan

pelaburan plaintif (lihat perenggan 15).] A

Notes

For cases on breach, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 3477–3499. B

Wan Azwan Aiman (Aiman Ariff and Fakhrul Redha with him) (Azwan Aiman Fakhrul & Co) for the plaintiff.
LK Chow (HM Chia and Pearly Chua with her) (Josephines, LK Chow & Co) for the defendant. C

Akhtar Tahir J:

BACKGROUND FACTS

[1] The thrust of the plaintiff's claim against the first and second defendant is in respect for the sum RM2m which the plaintiff had invested towards the first defendant's project under an investment agreement. D

[2] It is the plaintiff's case that upon an assurance and representation from the second defendant on the profitability of the venture he had entered into investment agreement on 1 March 2012 with the first defendant for a movie project known as 'Kisah Paling Gangster', with artistes known as Tedd Chan and Bell Foo. The investment was to defray the cost of the production of the movie as well to pay expenses for the two actors mentioned in the agreement, E F

[3] A core provision in the investment agreement was a duty upon the defendants to prepare and provide to the plaintiff a half yearly statement of income and expenditure. It is an admitted fact by the defendants that this was not done. G

[4] The actual dispute between the plaintiff and the defendant arose when the plaintiff demanded a return of his investment of RM2m after the completion and showing of the movie to the public. The defendants refused to refund the investment sum on the pretext that the investment sum need only be returned if the film made a profit. In this case the defendants claimed that the film had in fact suffered a loss. H

[5] Upon the second defendants refusal to refund the investment sum and upon the second defendants attempt to avoid meeting the plaintiff the plaintiff sought the help of some friends to lure the second defendant for a meeting. This meeting took place at the One World Hotel, Petaling Jaya on 16 January 2017. During the meeting, the second defendant agreed to return the plaintiff investment sum wherein the second defendant had executed two guarantees for I

A the repayment of sum invested. The second defendant also transferred sum of RM30,000 to the plaintiff's account on the same day.

[6] However, the second defendant failed to comply with the arrangement as agreed and thus being aggrieved, the plaintiff filed this suit seeking for the return of balance of RM1.92m due and payable to him. Meanwhile, the defendants in their statement of defence and counterclaim dated 23 November 2017 challenged the validity of the two guarantees issued and the sum of RM30,000 paid to the plaintiff on 16 January 2017 as it was alleged to be made under coercion and duress.

C

THE ISSUE

[7] After sieving through the facts and evidence in this case the court determined that the major issue to be decided in this case is whether the defendants has breached the investment agreement enabling the plaintiff to terminate the agreement and recover his investment. The other issues which arose during the course of trial of whether the plaintiff entered in to the investment agreement voluntarily or whether the second defendants was coerced into agreeing to refund the investment are peripheral matters to the major issue.

THE FINDING OF THE COURT

[8] In determining the main issue at hand the court found it necessary to consider the investment agreement. Although the Investment agreement is only between the plaintiff and the first defendant it is clear in lifting the veil of corporation that the person behind and in control and in contact with the plaintiff is the second defendant. Similarly the second defendant is the person behind Passion Music another company in whose account the money invested by the plaintiff was channelled into. It is my finding that the face behind the mask of both companies is no other than the second defendant.

[9] In interpreting the investment agreement it has to be looked in its totality. The intention of the parties is captured in the preamble where it is stated as follows:

> the investor is desirous to invest a certain amount of money ... for purposes of assisting the company in the production and marketing of the project, to help defray the day to day expense of the project ...

I

[10] The intention being clearly spelled out it therefore follows that the first defendant has a duty to update the plaintiff on the utilisation of the investment. The agreement recognises this need to update the plaintiff by including cl 2.4 which states as follows:

> The Company shall provide the Investor *half yearly income and expenditure reports* on the Project until such time the Project shall be completed.

The plaintiff has interpreted the clause in the disjunctive by stating that the first defendant has to provide two things first a half yearly income and second half yearly expenditure report. The court does not find any merit in this interpretation and the reading of the clause in its entirety only obligates the first defendant to provide half yearly and income and expenditure reports and not half yearly income.

[11] Be that as it may the undisputed and agreed fact in this case is that these half yearly reports were never given to the plaintiff at any time during the duration of two years of the agreement. The only explanation from the defendants on this failure to supply the reports is that the plaintiff never asked for them. This was denied by the plaintiff who stated he constantly called the second defendant seeking progress of the making of the movie.

[12] It is the court's view that cl 2.4 is a material requirement in the agreement and the failure of the defendants in complying with this clause is a material breach of the agreement. The defendant's argument that the movie did not make a profit is immaterial as the profit of the movie could only be determined after the movie was completed and shown in the theatres. What is more important under this agreement is the period of time when the movie was being made. It is during this period that the parties would have to ensure that the money invested by the plaintiff was being properly utilised. By not providing the plaintiff with the half yearly reports the plaintiff was deprived of the knowledge as to the utilisation of his investment. In fact the plaintiff was fully prepared to lose his whole investment if the movie did not make a profit as is provided under cl 2.3. The second defendant's argument that the plaintiff did not ask for the reports does not absolve him to adhere to the contractual terms of the agreement. Keeping the plaintiff in the dark of the progress of the financial situation in the making of the movie is tantamount to betraying the plaintiff.

[13] The plaintiff is therefore justified in resorting to cl 5.3 of the agreement which states as follows:

> For avoidance of any doubt, in the event of any default by the Company under this Clause and/or any other provision of the Agreement, the quantum which the investor shall be entitled to claim against the Company shall be limited to the quantum of the Investment without any interest imposed on the investment whatsoever

This is what exactly claiming in this case a sum of RM2m minus the sum

already paid to him to the amount of RM80,000. The plaintiff is not claiming more than this and certainly not claiming for any profits.

[14] For sake of completion the court on the peripheral matters the court in this case believed the testimony of the plaintiff that he was induced unfairly by the second defendant to make the investment so as not to lose the commission owed by the second defendant to him. The court did not believe the second defendant's testimony that the investment was thrust upon him against his wishes. It is clear by utilising the plaintiff's money the defendant had gladly accepted the plaintiff's investment.

[15] On the second defendant's evidence that he was lured into the meeting on 16 January 2017 with the plaintiff under deception might be true. The plaintiff in a desperate attempt to force a refund of his investment from the second defendant might have resorted to high handed tactics. The fact however remains that during the meeting the second defendant had promised to return the investment sum gradually. It is the court's finding that this promise from the second defendant was not made under coercion but voluntarily as if it was otherwise the second defendant had the opportunity to voice his protest at the meeting or afterwards to the journalist who had interviewed him. The second defendant did not do so is an indication that deep inside the second defendant knew he had to refund the plaintiff's investment.

FINAL DECISION

[16] For the foregoing reasons as elucidated above, the plaintiff's claim for the sum RM1.92m is therefore allowed against the defendants with costs of RM30,000 and the defendant's counterclaim is dismissed with costs of RM10,000.

Plaintiff's claim allowed with costs of RM30,000 and defendants' counterclaim dismissed with costs of RM10,000.

Reported by Izzat Fauzan